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HOME INSURANCE COMPANY, Plaintiff, v. CORNELL DUBILIER ELECTRONICS, INC., *et al.*, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY Docket No. MER-L-5192-96

BRIEF ON BEHALF OF INTERVENOR DEFENDANT EXXON MOBIL CORPORATION IN OPPOSITION TO CORNELL-DUBILIER ELECTRONICS, INC.'S MOTION IN LIMINE TO PRECLUDE EVIDENCE AS TO ISSUES PREVIOUSLY DECIDED BY THIS COURT

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Exxon Mobil Corporation, as Indemnitor ("Exxon") submits its opposition to Cornell-Dubilier Electronics, Inc.'s ("CDE") Motion in Limine to Preclude Evidence as to Issues Previously Decided by this Court.

Introduction

CDE's Motion in Limine seeks to preclude the supposed re-litigation of issues related to the Exxon Policies' "Occurrence" definition and Pollution Exclusions. As explained in Point I, below, CDE has not set out any basis for this relief other than supposed prejudice from the discovery misconduct of a small subset of insurers who were on FPE or Reliance Policies in the 1950's, 1960's, and 1970's and also on various layers of the Exxon Policies in the period 1979 to 1983. This small subset of insurers is commonly referred to in this case as the "LMI". CDE never explains why Judge Smithson's 2009 refusal of this sanction with respect to the LMI should be revisited. CDE also does not explain why Exxon and the 182 insurers who are on the Exxon Policies, but were not on the FPE/Reliance Policies, should be sanctioned for the LMI's discovery abuse.

While the nomenclature for this motion may not appear to be important, in fact, it is important, because that nomenclature will provide the rules of decision for the motion itself. In Point I, Exxon posits that the motion must either be one for summary judgment on issue preclusion principles or one for discovery sanctions based on the LMI's earlier discovery misconduct. Point I also explains that the standards governing these motions have not been met by CDE.

Turning to CDE's arguments, they are premised on the claim that the Occurrence language and Pollution Exclusion language of the earlier LMI policies that were the subject of the 2004 trial are the same as the Occurrence and Pollution Exclusion language in the Exxon

Policies. CDE also argues that the issues to be tried under the Exxon Policies' language are the same as the issues that were in fact tried in 2004. Neither assertion is true. Moreover, CDE completely ignores the fact that fully 182 insurers on the Exxon Policies were not aware of nor did they participate in the 2004 trial precisely because the Exxon Policies were not a part of the 2004 trial. (Maniatis Cert., at ¶¶ 4, 6) (Toriello Cert. Ex. B). So too, Exxon, as indemnitor did not participate in the 2004 trial for this same reason.

With respect to the language of the policies, Point IV of this Memo demonstrates that save for one provision in the excess policies' exclusions, the exclusions are, in fact, not the same. Even as to that provision, however, the LMI in 2004, for whatever reason, did not try the issues raised by that exclusion namely, was the pollution caused by a sudden, unintended and unexpected happening during the policy period. (Sanoff Cert., Ex. M at Cornell 3719) The LMI and, in turn, the Court only tried the wholly different issue of whether environmental harm was expected or intended by CDE from 1936 to 1962 when it knowingly discharged TCE and PCB containing products on the land, in the air, and in a stream at the South Plainfield site. That issue is relevant to the Occurrence clause in the earlier policies tried in 2004; it is not relevant to the conditional pollution exclusion in excess Exxon Policies, or even for that matter, the pollution exclusion in the 1979 Reliance Policy that was a part of the 2004 trial.

In order for the Court at the 2004 trial to have tried the issue presented by the conditional exclusion in the excess Exxon Policies, the Court would have had to have decided whether there were any sudden, unexpected, and unintended happenings in the period 1979 to 1983 that caused the pollution. (*Id.*, Ex. P at Exxon 4511) At page 775 of the 2004 trial transcript, the Court made clear in its decision that it did not deal with this limited type of "happening" and certainly did not deal with the period 1979 to 1983. The Court stated:

> Having done all that, the court will not try to pinpoint here... at what exact point in time industry knowledge or specific knowledge of CDE and FPE surmounted the *Morton* factors. *The only thing it needs to decide for purposes of this case is whether that knowledge was present and that awareness was present by the middle of 1962 regarding this particular plant and this particular company.*

(Toriello Cert., Ex. H at 775) (emphasis added). In short, the Court never looked beyond 1962 to determine whether there were any sudden, unexpected, and unintentional happenings in 1979 to 1983 that caused the pollution at this site or any other site. That is the issue that is relevant to the excess Exxon Policies' conditional pollution exclusion and it was neither considered nor decided in the 2004 trial. There cannot therefore be issue preclusion on that issue.

Beyond the conditional exclusion in the excess Exxon Policies, there are also two absolute pollution exclusions implicated in this case. Neither of these clauses appear in any of the policies tried in 2004. The first of these clauses excludes all damage directly or indirectly caused by seepage, pollution, and contamination with respect to operations on, over, or under water. (Sanoff Cert., Ex. P at CDN 310, 584). As the expert Robert Zoch explains, one of the main pathways for the discharge of chemical wastes at South Plainfield was the discharge of numerous chemical wastes through outfalls to the Bound Brook. This was plainly an operation on, over, or under water. (Sanoff Cert., Ex. H at 9-11). So too, the use of a dump at the site (*Id.* at 11-12) which is suspected of polluting ground water at the site[1], also constitutes operations on,

[1] The groundwater beneath the site and Bound Brook comprise two areas, or Operable Units, at the site at which pollution and contamination have been or may be found. As the EPA's website explains, the environmental claims here concern CDE's operations at its former plant located at 333 Hamilton Boulevard in South Plainfield. The EPA began its Remedial Investigation/Feasibility Study for the site in April 2000. EPA's investigations have included sampling on-site soil and buildings, soil from adjacent residential properties, groundwater, sediments and surface water in the Bound Brook corridor. In performing its work at the site, the EPA divided the site into separate phases, or operable units. Operable Unit 1 (OU1) concerns the contaminated soils at residential, municipal, and commercial properties in the vicinity of the former facility. The former plant site, which includes the contaminated soils and buildings, has been denominated the second Operable Unit, or OU2. The contaminated groundwater at the site has been denominated as Operable Unit 3 (OU3) and contaminated sediments in the Bound Brook are denominated Operable Unit 4 (OU4). *See* CORNELL DUBILIER ELECTRONICS, EPA REGION 2, SITE DESCRIPTION (2010), http://www.epa.gov/region02/superfund/npl/0201112c.pdf.

over, or under water. This same suspected ground water pollution and dump implicates another absolute pollution exclusion in the excess Exxon Policies. That provision excludes any liability for removal of, loss of or damage to "sub-surface oil, gas, or *any other substance*, the Property of others." (*Id.*) At the time these policies were written in 1979 to 1983, the capacitors and contaminated dirt and the possibly contaminated ground water were all subsurface substances belonging to others. The 2004 trial never dealt with these absolute pollution exclusions. Indeed, there is no equivalent exclusion in the FPE/Reliance policies at issue in 2004. (Sanoff Moving Cert., Ex. M at 003719).

With respect to the lower level Exxon Policies' pollution exclusion, these are different than the Reliance policy exclusion. Rather than focusing on sudden, unexpected and unintended happenings in 1979 that caused pollution as provided in the Reliance policy language or the knowledge or expectation of environmental harm in the period before 1962 as was actually tried in the 2004 trial, the lower level Exxon Policies' pollution exclusions exclude claims resulting directly or indirectly from seepage, pollution or contamination that results from a known violation of law. The exclusion also excludes claims related to seepage, pollution or contamination that was intended or expected from the standpoint of the insured. (Sanoff Cert., Ex. O at Exxon 03819) Neither exclusion has a corollary in the 1979 Reliance policy. Importantly, the Court in 2004 focused on knowledge of environmental harm, rather than expected or intended seepage, pollution, or contamination. The New Jersey Supreme Court has found that these inquiries are decidedly different. *Morton International Inc. v. Gen'l Acc. Ins. Co.*, 134 N.J. 1, 2830 (1993)

Statement of the Case

This action was commenced in 1996 as a declaratory judgment action by Home Insurance Company ("Home") against CDE and Federal Pacific Electric Company ("FPE") seeking a

declaration as to which policies covered environmental claims against CDE and FPE. Home served a First Amended Complaint in 1997. In 2002, CDE filed a Second Amended Answer to this Amended Complaint, with Crossclaims. (Toriello Cert., Ex. K, ¶ 9). Some of the defendants denominated as "Certain Underwriters at Lloyds" filed an Answer to the CDE Second Amended Crossclaims in 2002, and referred to themselves as London Market Insurers ("LMI") because the answer was filed on behalf of certain syndicates at Lloyd's, as well as certain insurance companies that had subscribed to 11 insurance policies that had been identified by CDE in its Crossclaims, namely, the FPE/CDE London Insurance (herein also referred to as the Reliance/FPE insurance). (*See* Maniatis 2010 Cert. at ¶¶ 8-11, attached to the Toriello Cert. as Ex. K.)[2] None of the policies identified were polices that had been issued by the LMI to Exxon during the 1979-1983 time period.

The CDE Crossclaims, the London Market Insurers, and, indeed, the litigation with respect to the LMI focused on the FPE/CDE London Insurance. *See id.*, ¶ 12. Thus, the 2004 trial before Judge Sabatino, as well as the 2007 Dismal Swamp summary judgment motion referred to by CDE, dealt only with the 11 policies that comprised the FPE/CDE London Insurance. *See id.* Neither the trial nor the motion dealt at all with the Exxon Policies. *See id.* Moreover, there are 182 other insurers under the Exxon Policies who have never been named or joined in this action, and were not even advised that the Exxon Policies were at issue at the time of the 2004 trial or at the time of the Dismal Swamp summary judgment motion. (*See* Maniatis 2011 Cert., ¶ 4, attached to the Toriello Cert. as Ex. B). CDE claims that these insurers will be bound by the results in this claim against the LMI. (Toriello Cert., Ex. C at 8) And, importantly, Exxon, as an indemnitor, was not involved in the 2004 trial.

[2] "Maniatis 2010 Cert." refers to the Certification of George L. Maniatis, dated July 28, 2010, and submitted in opposition to CDE's 2010 motion for summary judgment concerning the Exxon Policies.

With respect to the 2004 trial, and as discussed below in greater detail, it is clear that this trial was limited to determining whether there had been an "occurrence" under the FPE/CDE London Insurance policies at issue at that trial. In keeping with the limited scope of the trial, the evidence adduced, including the expert report and testimony of Dr. Wagner, cited by CDE, all related to the issue of whether the property damage at the site was "expected or intended," such that an "occurrence" was demonstrated. This is made clear in Judge Sabatino's decision that there had been an occurrence; a decision premised on the finding that the property damage at the site was not expected or intended. (Toriello Cert., Ex. H, 774:9-17). As to a finding on the pollution exclusion provisions in the policies that were the subject of the trial, Judge Sabatino found that there was no serious effort to show the applicability of the pollution exclusion. (*Id.* at 777:21-778:8). Rather, from the opening and throughout the trial the focus was on the expectation or intention of the harm that resulted from CDE's intentional disposal activities, and not a sudden, unintended, and unexpected happening during policy periods in 1979 and earlier.

After the trial before Judge Sabatino, the LMI and CDE discovered the existence of policies issued by the LMI to Exxon (the so-called "Exxon Policies"). On January 7, 2009, CDE filed an application for sanctions related to the LMI's failure to produce or identify the Exxon Polices previously in the litigation. CDE sought, *inter alia*, to estop the LMI from denying coverage under the Exxon Policies or from asserting any defenses thereto. CDE also sought its legal expenses. (Toriello Cert., Ex. A, 3-4). In an 11-page decision, Judge Smithson analyzed the history of the litigation, including the discovery that had been propounded, the conduct of the LMI in responding to the discovery, as well as the conduct of CDE, and concluded that the LMI had no knowledge of the Exxon Policies and did not have "a design to mislead." (*Id.* at 9.) It also concluded that the LMI did not affirmatively destroy evidence or withhold testimony, and

thus the court found that dismissal of the LMI's pleadings and defenses was not appropriate. (*Id.*) It similarly found that the LMI should not be estopped from arguing any defense to coverage under the Exxon Policies. (*Id.*) Instead, the court ordered the parties to engage in discovery to incorporate the Exxon Policies into the case, with LMI to bear the cost of this discovery. (*Id.* at 10-11).

In May 2010, CDE advised the court and the parties to this litigation of its intent to seek summary judgment on the Exxon Policies. CDE filed its motion seeking summary judgment, despite not having amended its crossclaims to assert claims under the policies or to join all of the insurers under the Exxon Policies as parties to the litigation. (*See* Toriello Cert., Ex. C). At that time, Exxon also advised of its intent to intervene in the action, as indemnitor of the LMI. Exxon filed its complaint in intervention in August 2010 and asserted numerous defenses to the claim for coverage under the Exxon Policies. In denying CDE's motion for summary judgment, this Court expressly permitted Exxon to conduct discovery on its policy defenses, including without limitation, defenses of known loss and pollution exclusion, and its "many other" policy defenses. (Toriello Cert., Ex. L at 34-35). Factual discovery ended on October 14, 2011, and expert discovery is ongoing. That the parties' expressly contemplated submission of the very expert evidence that CDE now seeks to preclude is evident from the Case Management Order entered on January 10, 2012. (Toriello Cert., Ex. M). The Case Management Order states that "expert Disclosures on issues relating to coverage under the Exxon Policies on which disclosing party has the burden of proof" were due on February 10, 2012. (*Id.*) Responsive Expert Disclosures relating to coverage under the Exxon Policies were due on April 10, 2012. (*Id.*) At no point during the discussion regarding scheduling of expert discovery did CDE raise preclusion of any of Exxon's defenses.

In accordance with the Case Management Order, on February 10, 2012, Exxon served the Expert Opinions of Wayne M Grip, Robert Zoch, and John Richard Ludbrooke Youell.[3] CDE's expert reports were due on April 10, 2012. On March 1, 2012, CDE served a so-called Motion in Limine to Preclude Evidence as to Issues Previously Decided by this Court, seeking findings that (1) the LMI and Exxon are bound by previous findings of this Court with respect to issues of coverage for South Plainfield and Dismal Swamp Sites; and (2) with respect to coverage under the Exxon Policies, LMI and Exxon are precluded from presenting evidence about issues that were previously decided by the Court with respect to South Plainfield and Dismal Swamp Sites, including the issue of whether CDE expected or intended contamination or harm and the issue of whether coverage is barred by a pollution exclusion provision.

The occurrence and pollution exclusion provisions of the Exxon Policies are fundamentally different from the standard form policy provisions that were at issue in the 2004 trial and Dismal Swamp summary judgment motions. These differences, discussed in greater detail herein, include the following:

- The language cited by CDE from the earlier FPE/CDE London Insurance policies defines an "occurrence" to mean an accident that results in injury, damage or liability that is "neither expected nor intended from the standpoint of the insured...."; this language ties any analysis of whether an occurrence has happened to a subjective analysis of what the insured knew. There is no similar requirement in the Exxon Policies' provision quoted by CDE.

[3] On February 15, 2012, Exxon served a revised report of Mr. Youell, which corrected a formatting oversight in the report circulated on February 10, 2012.

- To the extent the policies that were subject to the 2004 trial had pollution exclusion provisions, those provisions, as conceded by CDE, were industry form provisions which were not negotiated by the parties, and indeed not drafted by the insured.

- The lower level Exxon Policies contain a pollution exclusion provision that is not standard; that was drafted by Exxon; that omits any temporal requirement for any seepage, pollution or contamination; and that lists two events, either of which will bar coverage under the policies: (1) known violation of a statute, regulation, ordinance or law; (2) if the seepage, pollution or contamination is expected or intended from the standpoint of the insured.

- The Exxon Policies also include upper level excess policies which also were not the subject of the 2004 trial or Dismal Swamp summary judgment motion; the pollution exclusion provisions in these upper level or excess policies exclude coverage for liability for seepage, pollution or contamination for operations on, over or under water (an exclusion that is directly implicated by the CDE dump and the outflows from CDE's South Plainfield plant that dumped material into the Bound Brook); exclude damage to subsurface substances, which necessarily includes the ground water beneath the site; and exclude damage due to pollution unless CDE proves an exception to the exclusion, namely that the pollution was caused by an unexpected, unintended, sudden happening during the policy period. Here, that period is the 1979-1983 period, a time period that was not at issue in the 2004 trial.

These factors, coupled with the arguments below, mandate that CDE's motion be denied.

POINT I

CDE HAS NOT SHOWN THAT IT IS ENTITLED TO THE RELIEF IT SEEKS WHICH IS EITHER A PARTIAL SUMMARY JUDGMENT OR A DISCOVERY SANCTION.

Although CDE styles its motion as an in limine motion, in point of fact, its motion seeks relief in one or both of the following forms: (1) a partial summary judgment determination that issue preclusion applies here to prevent litigation of either CDE's satisfaction of its burden to show that there was an occurrence under the Exxon Policies or the applicability of any of the pollution exclusions in the Exxon Policies, or (2) a grant of reargument of its discovery sanctions motion decided by Judge Smithson on June 26, 2009. A motion in limine should not be used as a procedural tool to circumvent the procedural requirements of a summary judgment motion or as a tool to re-argue and expand discovery sanctions. Unless CDE is entitled to judgment on these issues as a matter of law, or Exxon is somehow precluded from the LMI policies because of some previous improper conduct by LMI, the motion in limine should be denied and the court should hear the evidence. As discussed in more detail below, CDE has not even addressed, much less established, the standards applicable to either form of relief.

A. CDE's Motion Is One Seeking Partial Summary Judgment on Issue Preclusion and CDE Has Not Met the Summary Judgment Standard

Although CDE labels this motion as a motion in limine, an evidentiary motion, this is not simply an evidentiary motion seeking to narrow issues for proof at trial. It is clear that what CDE really seeks is summary judgment with respect to Exxon's defenses based on the occurrence and pollution exclusion policy provisions. The motion in limine filed by CDE is simply not the appropriate vehicle to determine these issues. *Bowers v. Nat'l Collegiate Athletic Ass'n,* 563 F. Supp. 2d 508, 531-32 (D.N.J. 2008) ("As the Court of Appeals has recognized, [u]nlike a summary judgment motion, which is designed to eliminate a trial in cases where there are no genuine issues of fact, a motion *in limine* is designed to narrow the evidentiary issues for

trial and to eliminate unnecessary trial interruptions." [citation omitted] .... "An *in limine* motion is not a proper vehicle for a party to ask the Court to weigh the sufficiency of the evidence to support a particular claim or defense, because that is the function of a motion for summary judgment, with its accompanying and crucial procedural safeguards."). *See also, e.g, Middlebrooks & Shapiro, P.C. v. Esdale*, No. A-3285-02T1, 2005 WL 3691314, at *2 (App. Div. Jan. 20, 2006) (concerning motion for summary judgment seeking bar of counterclaim on basis of res judicata and collateral estoppel or issue preclusion); *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 369, 646 A.2d 452, 460 (App. Div. 1994) (involving a motion for summary judgment on the ground of issue preclusion).

As set forth in R. 4:46-2(c), a motion for summary judgment may only be granted where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Not only is a trial court precluded from granting a motion for summary judgment when a "genuine issue of material fact" is in dispute, *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 446, (2007) (quoting *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995)), but the burden "to exclude any reasonable doubt as to the existence of any genuine issue of material fact" resides with the movant. *Judson v. Peoples Bank & Trust Co. of Westfield, et al.,* 17 N.J. 67, 74 (1954).

CDE's burden on a motion for summary judgment is particularly heavy, since the non-movant's papers are indulgently treated and all favorable inferences that can be deduced from the evidence must be granted to the non-movant. *Id.* at 75; *see also Coyne v. State Dep't of Transp.*, 182 N.J. 481, 490-491 (2005); *Brill, 142 N.J.* at 536. Furthermore, if the evidence presented and

viewed in the light most favorable to the non-movant "presents a sufficient disagreement" or is, itself, "sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party," summary judgment must be denied. *Id* at 523.

Thus, unless the moving party can sustain its burden to show clearly that there are no material facts in dispute, the non-movant must prevail and the motion for summary judgment must be denied. *Judson*, 17 N.J. 67 at 74.

Moreover, CDE has not met the procedural requirements of a summary judgment motion. Rule 4:46-2(a) states that a summary judgment motion, in addition to a brief, must be accompanied by a statement of material facts, which is to "set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted . . . . A motion for summary judgment may be denied without prejudice for failure to file the required statement of material facts." CDE has not submitted a statement of material facts. This statement of material facts is an important procedural safeguard intended to assist in the determination of the existence of triable issues of fact on a summary judgment motion. Indeed, the commentary to Rule 4:46-2 states that the requirements for making and resisting a summary judgment motion are "intended not only to focus the parties' attention on the areas of actual dispute but should significantly facilitate the Court's review." *See* Comment R. 4:46-2 (1.1). CDE should not be permitted to circumvent this safeguard on this motion.

B. Alternatively, CDE's Motion May be An Untimely and Insufficient Motion for Reconsideration

CDE does not expressly request a discovery sanction, but the only basis that it offers for the relief that it seeks is the claim of some prejudice arising from the prior discovery misconduct

of LMI. (CDE Mem. 2). Through its motion, CDE again seeks to impose sanctions for the LMI's failure to produce the Exxon policies earlier in this litigation even though this Court previously refused to grant the precise sanction of issue preclusion. Judge Smithson was clear in his June 26, 2009 Order and Opinion that the only sanctions he granted against the LMI was shifting to the LMI CDE's expenses and attorneys fees for engaging in discovery concerning the Exxon policies. (Toriello Cert., Ex. A at 10). Judge Smithson specifically permitted the parties "to engage in discovery reasonably necessary to incorporate the Exxon policies into the case," including CDE's re-deposing witnesses and revising expert reports. (*Id.* at 10-11). He explicitly refused to preclude the LMI from raising defenses to coverage, including the defenses currently raised by Exxon, under the Exxon Policies. He also made clear that, as a result of the sanctions he issued, the only prejudice resulting to CDE for the LMI's failure to disclose the Exxon Policies earlier in the litigation was "some minimal prejudice due to the delay caused by additional discovery." (*Id.* at 11). CDE's argument that it is prejudiced by the costs associated with responding to Exxon's expert reports has already been addressed by Judge Smithson in his comprehensive opinion on discovery sanctions. Judge Smithson addressed this prejudice by permitting CDE to recoup its fees and expenses from LMI related to the additional Exxon Policy discovery. (*Id.* at 10). CDE has not shown that this decision should now be revisited by this Court.

New Jersey Rule of Court 4:49-2, titled *Motion to Alter or Amend a Judgment or Order* provides that:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or

> controlling decisions which counsel believes the court has overlooked or as to which it has erred.

CDE's motion is plainly untimely and should be denied. The twenty-day time restriction set forth in Rule 4:49-2 has long passed. While a court may reassess a prior decision to correct an error, CDE's motion does not demonstrate any error by Judge Smithson.

Indeed, CDE has not presented any facts or argument that would support reconsideration of the Court's previous decision relating to sanctions against the LMI. "A motion for reconsideration is not a second or third opportunity to reargue a motion. Rather, it is designed for the limited purpose to seek review of a prior order when the judge has overlooked critical information or misapprehended information in the record or has overlooked relevant authority." *Martinovich v. Iglesias*, No. A-0163-10T4, 2012 WL 570053, at *2 (App. Div. Feb. 23, 2012). CDE has not presented any good cause for the reconsideration of the sanctions Judge Smithson deemed appropriate, especially in light of the fact that any prejudice CDE may claim to suffer due to increased costs is non-existent and "adequately address[ed]" by the sanctions Judge Smithson issued against the LMI. (Ex. A to Toriello Cert., at 11). Nor does CDE present any facts, information, or relevant authority that Judge Smithson overlooked or misapprehended in rendering his Order and Decision. As a result, not only is CDE's motion seeking reconsideration of the issue of discovery sanctions procedurally deficient, it is substantively deficient as well, and should be denied on both grounds.

POINT II

THIS COURT HAS NOT TRIED THE ISSUES WITH RESPECT TO THE OCCURRENCE OR POLLUTION EXCLUSION PROVISIONS CONTAINED IN THE EXXON POLICIES

CDE's depiction of the 2004 South Plainfield trial, and in particular its claim that the issues tried related to the applicability of the pollution exclusions and occurrence provisions in

the Exxon Policies (CDE Mem., 4-10), is inaccurate and incomplete. Starting with the parties' opening statements, it is evident that the 2004 trial was limited to determining whether there had been an "occurrence" under the FPE/Reliance policies at issue at that trial. CDE identified the issues to be tried in its opening statement:

> At the end of this trial, the court will decide whether the insurers breached their duty to provide coverage for the Hamilton Boulevard site. The key issue in that decision was whether there was an occurrence. All of the policies used a similar definition of occurrence that consists of four basic elements.
>
> First, was there an event happening, or accident, two, that resulted in property damage, three, during the policy period, four, that was neither expected nor intended from the perspective of the insured.

(Toriello Cert., Ex. H, at 16-17).

So too, LMI, in its opening statement, described the issue for trial as:

> [t]his is a limited proceeding, and the proceeding is attempting to address very narrow areas of inquiry, and those areas and the primary area concerns whether or not the damage which occurred at the South Plainfield site as a result of the routine business practices of CDE during its long ownership and operation of this facility resulted in damage that was neither expected nor intended by CDE.
>
> * * * *
>
> You may be finding that there was an occurrence by virtue of the fact that damage which occurred during the policy periods was not expected nor intended, or you may find that it was expected or intended.

(Toriello Cert., Ex. J, at 27-28). Neither party's opening statement (or even proof) referenced the pollution exclusions in the policies that were the subject of the 2004 trial.

As CDE readily concedes, the 1978 - 1979 policies issued to Reliance (the "Reliance Policies"), which were some but not all of the policies subject to the 2004 trial, define an "occurrence" to mean:

> an accident, including a continuous or repeated exposure to conditions, which results, during the policy period, in a personal injury, property damage or advertising liability neither expected nor intended from the standpoint of the insured....

(CDE Mem., at 11, citing Sanoff Cert., Exs. M and N).

The "expected or intended" issue tried before Judge Sabatino, focused solely on whether the specific property damage, namely environmental harm caused by PCBs and TCE was expected or intended by CDE. And, in keeping with the limited scope of the trial, the evidence adduced with respect to PCBs and TCE, including Dr. Wagner's testimony related to the issue of whether the property damage at the site was "expected or intended," such that an "occurrence" was demonstrated under the Reliance/FPE policies. This is made clear in Judge Sabatino's decision that there had been an occurrence; a decision premised on the finding that the property damage at the site was not expected or intended. (Toriello Cert., Ex. H, 774:9-17). Judge Sabatino summarized his decision as follows:

> Thus, the Court finds that there was an occurrence on the site for which coverage is applicable; that the exclusion for expected or intended harm that appears in both of the London Market policies and the United policies does not defeat coverage in this case.

(Toriello Cert., Ex. H at 776:14-20).

Importantly, Judge Sabatino's reference to the "exclusion for expected or intended harm" is a clear reference to the inquiry that is relevant to the "occurrence" issue and the exclusionary language that appears in the "occurrence" definition of the Reliance/FPE policies. This is not the inquiry relevant to the pollution exclusion. CDE's counsel recognized this since after the dictation of the decision, he asked the Judge:

> One question, which is, when you say expected or intended, you were also including the pollution exclusion in that as well.

Id. at 777.

Judge Sabatino responded:

> There was no serious effort made in this case to show the pollution exclusion, apart from expected or intended, would defeat coverage here, so that the only real aspect that was litigated --- the Court finds the pollution exclusion is not

applicable here subject to the owned property exclusion and other exclusions that I have reserved on.

Id. at 777-78.

As Judge Sabatino stated, there was no serious effort to show the applicability of the pollution exclusion. Rather, from the opening and throughout the trial the focus was on the expectation or intention of the harm that resulted from CDE's intentional disposal activities, and not the expectation or intention to deposit or discharge industrial wastes, such as reject capacitors and chemical waste, or more to the point for that trial. a sudden, unexpected happening in 1979 (Sanoff Cert., Ex. M at Cornell 3710). Indeed, in reaching his decision, Judge Sabatino analyzed and relied on the *Morton* factors for determining whether there had been an "occurrence." *See id.*, at 747:13-776:20; *see also Morton,* 134 N.J. 1, 28-29 (1993).

New Jersey law recognizes a clear distinction between what is needed to prove an "occurrence" and what is needed to prove (or disprove) the applicability of a typical sudden and accidental pollution exclusion. As explained by the *Morton* court, certain pollution exclusion clauses deal with the issue of whether the pollution itself was intended or expected, while the definition of occurrence is focused on the issue of whether the harm or property damage was expected or intended. *Morton,* 134 N.J. at 28-29.[4]

Morton specifically overruled the Appellate Division's decision in *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987). *Broadwell* had held that the standard pollution-exclusion clause should be understood merely to impose the same conditions on coverage as are imposed by the definition of "occurrence," which

[4] CDE's reliance on arguments made by the LMI in a summary judgment motion, allegedly stating that the subjective knowledge of the insured vis-a-vis pollution is needed to bar coverage under the pollution exclusion provisions tried in 2004, is misplaced. Even if the LMI made such an argument, the argument erroneously states New Jersey law and the clear distinction between a finding with respect to "occurrence" and with respect to pollution exclusion. The perpetuation of errors in law does not serve as a basis to apply issue preclusion. *See supra,* Point II, discussion of *Restatement (Second) of Judgments* and commentary thereto.

largely focuses "on whether the ultimate damage was expected or intended from the standpoint of the insured." *Morton,* 134 N.J. at 28. The *Morton* court was of the view that the phrase "sudden and accidental" contained in the operative pollution exclusion in the policies at issue in *Morton* "does not characterize or relate to the damage caused by pollution but instead narrowly limits the kind of "discharge, dispersal, release or escape" of pollutants for which coverage is provided." *Id.* at 28-29.

As such, the pertinent question under New Jersey law governing standard sudden and accidental pollution exclusions (an exclusion that is not at issue in the Exxon Policies issued by LMI or the 1979 Reliance Policy, but was contained in some of the policies at the 2004 trial) imposed by the insurer is *not* whether the insured intended to cause the property damage that resulted from intentionally discharged materials—*i.e.*, whether there was an "occurrence"—but rather, whether the insured discharged known pollutants. *See Universal-Rundle Corp. v. Comm. Union Ins. Co.*, 319 N.J. Super. 223, 234, 236, 725 A.2d 76, 82 (App. Div. 1990), *cert. denied*, 161 N.J. 149 (1999) (where there is a pollution exclusion clause, coverage cannot be afforded to an insured by simply finding there was an occurrence); *see also Morton*, 134 N.J. at 30 ("we perceive that regulators would reasonably have understood the effect of the [pollution-exclusion] clause to have denied coverage for the intentional discharge, dispersal, release, or escape of known pollutants, whether or not the eventual damage was intended or expected from the standpoint of the insured.").

Importantly, in order to avoid application of the conditional pollution exclusion in the Exxon Policies' excess of $110 million, CDE must prove that the seepage, pollution, or contamination "was caused by a sudden, unexpected, and unintended happening" during the policy period, to wit 1979 - 1983. (Sanoff Cert., Ex. P at Exxon 4510) No proof at the 2004 trial or on the

Dismal Swamp summary judgment motion identified any sudden, unexpected, and unintended happening in the period between 1979 and 1983 that caused the pollution at the South Plainfield site or the Dismal Swamp site.

There is no serious dispute that Judge Sabatino has concluded that the causative events, *viz.* CDE's disposal and burial of industrial and chemical refuse and factory waste at the South Plainfield site, were intentional:

> As to the burial of reject capacitors in the rear of the site, the Court finds that was clearly intentional, certainly not accidental. Certainly it was not due to the result of some oversight. There was a deliberate practice to dig a hole in the back of the property as described by the fact witness, and deposit those reject components into the ground. Indeed, there were photographs that were presented that resulted from the EPA's studies that were enlarged on the poster board before the Court that revealed sample instances of capacitors and other related materials turning up through the excavation that was done in the course of the remediation of the site or the investigation of the site. That was all clearly intended. There is no serious dispute that it was somehow accidental or careless.

(Toriello Cert., Ex. H, 750:11-751:4). In addition, all of the causative events identified by Judge Sabatino indisputably occurred before 1962 and not during the period 1979 to 1983. Finally, chemical waste and factory refuse were and still are *known pollutants* and have been recognized as such under New Jersey law since at least 1899. *See* Act of Mar. 17, 1899, ch. 41, 1899 N.J. Sess. Law (prohibiting the discharge into waters of "sewage, drainage, domestic or factory refuse, excremental, or other polluting matter...."; *see* Act of April 18, 1930, ch. 186, 1930 N.J. Laws; Act of April 23, 1946, chs. 123 & 138, 1946 N.J. Laws (Toriello Cert., Ex. K).

In brief, Judge Sabatino's finding that property damage at the site was not expected or intended simply cannot be the basis for a finding on the wholly different inquiries as to whether there was pollution from operations on, over, or under water, whether there was damage to a sub-surface substance such as groundwater, whether the pollution was caused by a sudden, unexpected and unintended happening during the period 1979 to 1983, or whether the seepage,

pollution, or contamination was intended or expected. Thus, it is pure folly for CDE to assert that the small subset of insurers referred to in this litigation as the LMI will "benefit from its misconduct" in failing to produce the Exxon Policies or that this subset of insurers will be "rewarded" by being given a "second chance," if Exxon is allowed to present evidence as to the applicability of the pollution exclusions in the various Exxon Policies. (CDE Mem., ¶¶ 2, 9, 16)

CDE has the findings and conclusions with respect to the policies tried in 2004 and those findings are not being revisited by Exxon, as indemnitor. CDE does not have a right to have those 2004 findings on different FPE and Reliance pollution exclusion language - findings that were predicated on a failure of proof and an apparent misapprehension by the LMI of the *Morton* holding, not on presentation of relevant evidence and argument - suddenly control the application of the various pollution exclusions in the Exxon Policies that: (a) were not the subject of the prior trial; and (b) implicate parties who were not before the Court in 2004. As to these policies and these parties, the applicability of the pollution exclusions remains an issue to be tried.

POINT III

RES JUDICATA, COLLATERAL ESTOPPEL AND LAW OF THE CASE ARE INAPPLICABLE

In addition to the procedural deficiencies attendant to CDE's current motion CDE's arguments fail to support preclusion of evidence here. Other than alluding to an undefined doctrine of "fairness" or prejudice - more appropriate to a motion seeking discovery sanctions as discussed *supra* - CDE does not explain the legal basis for its motion. CDE argues that Exxon should be barred from re-litigating issues that supposedly were previously decided. According to CDE, those issues are whether CDE has proven an occurrence under the Exxon Policies for pollution at South Plainfield or Dismal Swamp and whether CDE's claims under the Exxon Policies are barred by the various pollution exclusions that appear in the Exxon Policies. CDE

does not, however, even identify, let alone satisfy the elements necessary to apply such a doctrine to these issues with respect to the Exxon Policies.

The doctrines of *res judicata* and collateral estoppel are not applicable here. *Res judicata* (or claim preclusion) applies only to final judgments; it has no application with respect to interlocutory orders while the case is still pending, as is the case here. *See, e.g. Nikituk v. Lieze,* Civil No. 07-3808, 2009 WL 5206216, at *3 (D.N.J. Dec. 22, 2009) (claim preclusion requires a final judgment); *see also Capogrosso v. 30 River Court E. Urban Renewal Co.*, No. A-5356-06T3, 2009 WL 249202, at *6 (App. Div. Feb. 4, 2009). Under New Jersey law, interlocutory orders are not final orders and are subject to change until final disposition when the lawsuit is terminated. *Grow Company, Inc. v. Chokshi,* 403 N.J. Super. 443, 459 (App. Div. 2008) (A motion granting partial summary judgment is an interlocutory order). Indeed, in *ACBB Bits, L.L.C. v. 550 Broad Street, L.P.*, No. A–2734–09T1, 2011 WL 5838737, at *7 (App. Div. Nov. 22, 2011), the court noted that the New Jersey Supreme Court "interred any doubts about the propriety or the breadth of a trial judge's discretionary capacity, 'at any time prior to the entry of final judgment' to reanalyze and modify interlocutory rulings and correct whatever error is recognized in an earlier ruling." (quoting *Lombardi v. Masso,* 207 N.J. at 534). It is clear that Judge Sabatino's findings at the 2004 trial did not result in a final judgment - only a partial, interlocutory one. *Res judicata* has no applicability here.

Collateral estoppel is equally inapplicable. Under New Jersey law,

> [f]or the doctrine of collateral estoppel to apply to foreclose the relitigation of an issue, the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the

> doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Gannon v. American Home Products, Inc., 414 N.J. Super. 507, 521, 999 A.2d 522, 529 (App. Div. 2010) (quoting *Olivieri v. Y.M.F. Carpet, Inc.*, 186 N.J. 511, 521 (2006) (quoting *In re Estate of Dawson*, 136 N.J. 1, 20-21 (1994)) (internal citations and parentheticals omitted).

Here, and as discussed in detail, *infra*, Point IV, none of the requirements for collateral estoppel are met: the occurrence and pollution exclusion provisions at issue during the 2004 trial are fundamentally different from the definition of occurrence[5] and the Exxon SP&C Exclusion, and hence, the issues tried are not identical; whether there was an occurrence under the Exxon Policies or the applicability of the Exxon pollution exclusion were in fact not tried at the 2004 trial; moreover, the pollution exclusion provisions that were included in the policies that were subject to the 2004 trial were not actually litigated; there is no "final judgment" here, as the case is still pending; because there was no serious effort to address the issue of pollution exclusion, it follows that it was not essential to the court's determination of the "occurrence" issue that was tried in 2004; and finally, Exxon and the 182 insurers who are not joined in this action but did subscribe to the Exxon Policies are not in privity with the insurers in the earlier proceeding, nor could they have been, since the Exxon Policies were not a subject of the trial.

Restatement (Second) of Judgments, § 28 (1982), which has been adopted by New Jersey,[6] also shows that issue preclusion is inapplicable here. As noted in the Restatement *(Second)*, even where there is a final judgment - which is decidedly not the case here - relitigation of an issue is not precluded where the "party against whom preclusion is sought

[5] As discussed infra, the occurrence provision in the 1979 Lloyds Policy, cited to by CDE, defines an occurrence to mean a liability that was "neither expected nor intended from the standpoint of the insured...", thereby injecting a subjective element into the analysis. The Exxon Policies, on the other hand, do not contain the language "from the standpoint of the insured" and require an objective analysis.

[6] *Gannon*, 414 N.J. Super. at 530.

could not, as a matter of law, have obtained review of the judgment in the initial action." *Id.*, § 28(1). Here, neither Exxon nor the 182 insurers who did not subscribe to the policies at issue in the 2004 trial had the ability to challenge Judge Sabatino's findings. Relitigation is also not precluded where

> [t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the . . . interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Id. § 28(5); *see also Ensslin,* 275 N.J. Super. at 370. All of the above considerations apply here to a determination that was rendered under potentially inapplicable law, against other parties, on different policies with materially different provisions, and in the case of one of the pollution exclusions, without serious argument or presentation of evidence and apparently under a misapprehension of New Jersey law.

The commentary to the *Restatement (Second) of Judgments*, § 29 (1982), identifies still other circumstances that bar application of collateral estoppel. Such circumstances include the "disclosure that the prior determination was plainly wrong or that new evidence has become available that could likely lead to a different result.... The question is not whether a prior determination should be set aside but whether it should be treated as conclusive for further purposes." *Id.* Here, the court's prior determination that there had been an occurrence was based on a definition, as quoted by CDE (CDE Mem. 11), that is fundamentally at odds with the definition of occurrence in the Exxon Policies. And its determination as to the non-applicability

of the non-identical Reliance and FPE pollution exclusion provisions was based on no evidence or argument, and there simply is no basis to support a finding that it is conclusive for purposes of this motion, or indeed for the issues presented on the Exxon Policies. To the extent CDE argues that the LMI conceded that pollution exclusion will only bar coverage when the insured "expected or intended... the harm," (CDE Mem. 4) such a concession is premised on an erroneous interpretation of the law and can only affect the policies at issue at the time of the supposed concession. As discussed, New Jersey law, if applicable to the Exxon Policies, distinguishes between what is needed to prove an "occurrence" and what is needed to prove the applicability of a pollution exclusion provision such as the ones in the Exxon Policies.

Finally, "'even where these requirements are met, the doctrine [collateral estoppel], which has its roots in equity, will not be applied when it is unfair to do so.'" *Olivieri,* 186 N.J. at 521-22 (quoting *Pace v. Kuchinsky*, 347 N.J. Super. 202, 215, 789 A.2d 162, 170 (App. Div. 2002)); *see also In Re Coruzzi*, 95 N.J. 557, 568 (1984) (noting collateral estoppel should not apply when "sufficient countervailing interests" exist) (citation omitted). Exxon submits that to preclude a full and fair litigation of its defenses under the Exxon Policies on the basis of a trial that involved different policies, with differing occurrence definitions and differing (or non-existent) pollution exclusions, where such provisions were not even tried, and where Exxon and 182 insurers were not even parties, would be the pinnacle of unfairness.

The law of the case doctrine —a discretionary rule that only applies during the pendency of a particular case—is equally inapplicable. *Manzo v. Affiliated Building Corp.,* No. L-5766-96, 2006 WL 2390224, at *5 (App. Div. Aug. 21, 2006) (doctrine is discretionary and no court is irrevocably bound by its prior interlocutory ruling). Importantly, when the issues to be decided in a subsequent proceeding are supported by different facts involving substantially different

evidence and different parties, the law of the case doctrine does not apply. *Id.* at *5 (declining to apply the law of the case doctrine where the trial judge had new considerations to review which were not present when the initial summary judgment motion was decided; new considerations included an amended counter-claim that had not been raised previously); *Atlantic Employers Ins. Co. v. Chartwell Manor School,* 280 N.J. Super. 457, 470, 655 A.2d 954, 961 (App. Div. 1995) (law of the case inapplicable to summary judgment motions made in similar cases with different victims of claimed abuse at school, because each case with different victims could involve different facts and substantially different evidence).

In the present case and as discussed below, the provisions in the Exxon Policies are different from the policies at issue in the 2004 trial; and the parties are different as are the issues and evidence. It also is plain that there was no serious effort to show the applicability of pollution exclusions at the 2004 trial. Moreover, because CDE appears to admit that it will need to prepare new expert reports to rebut the reports submitted by Exxon, the only conclusion that can be drawn is that the issues raised by Exxon's reports are not the same as were previously submitted and determined. CDE has not shown that it satisfies the requirements for application of issue preclusion in this matter.

POINT IV

THE FUNDAMENTAL AND MATERIAL DIFFERENCES BETWEEN THE PROVISIONS OF THE EXXON POLICIES AND THE POLICIES SUBJECT TO THE 2004 TRIAL AND SUMMARY JUDGMENT BAR THE APPLICATION OF ISSUE PRECLUSION

CDE cannot surmount the fundamental differences that exist between the Exxon Policies and the policies that were at issue in the 2004 trial and with respect to Dismal Swamp.

A. Identity of Parties is Lacking.

It is clear that there is no identity of parties here. There are 182 other insurers under the Exxon Policies who have never been named or joined in this action, and who were not even advised that the Exxon Policies were at issue at the time of the 2004 trial. (*See* Maniatis Cert., ¶ 4, attached to the Toriello Cert. as Ex. B). CDE, though, has previously argued that these underwriters, who were not a party to the 2004 trial, should be bound by the decisions of this court on the Exxon Policies. *See* Ex. C to the Toriello Cert. (CDE summary judgment submission to this court dated Aug. 24, 2010, 5-9). Of course, Exxon also did not participate in the 2004 trial precisely because the Exxon Policies were not at issue. Moreover, there is a significant conflict of interest here. In this litigation, the limited subset of insurers referred to as the LMI—namely those insurers who were on the earlier Reliance and FPE/CDE policies and also on the Exxon Policies—do not have interests that are aligned with Exxon or any of the other 182 non-party insurers on the Exxon Policies. The interests of the LMI compared to the interests of Exxon and the remaining 182 non-party insurers are adverse because a finding of coverage under the Exxon Policies will reduce the amounts, in allocation, that the LMI will need to pay under the separately tried earlier policies. There is no identity of parties, nor is there privity of interest here, only a conflict of interest. Absent identity of the parties and their interests, it is evident that collateral estoppel and law of the case do not apply.

B. There are Differences Between the Occurrence Provision in the Exxon Policies and the Provision That Was the Subject of the 2004 Trial.

CDE concedes that the occurrence language in the Exxon Policies is different from the language in the Lloyds policies that were the subject of the 2004 South Plainfield and 2007 Dismal Swamp decisions." (CDE Mem. 11). "Similar" is not enough to support the application of collateral estoppel. There has been no trial on the language of the Exxon Policies. As quoted

by the LMI, the Reliance 1978/79 Policy provides that an "occurrence" is an accident that results in injury, damage or liability that is "neither expected nor intended from the standpoint of the insured...." (Ex. A to Sanoff Cert. at 15). The language "from the standpoint of the insured" injects a subjective element - the knowledge of the insured - into the analysis of whether there has been an occurrence. *Cf. Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619, 629, 570 A.2d 488, 490 (App. Div. 1990) (finding of the insured's subjective intent to cause injury necessary). CDE quotes the "occurrence" definition in the Exxon Policies (CDE Mem. 11), which requires that the conditions which cause injury to or destruction of property during the policy period be "unexpected" or "unintended," but does not include the language "from the standpoint of the insured." This definition calls for the application of an objective standard, and not a showing of the subjective knowledge and intent of the insured (CDE). As such, the evidence developed by Exxon, including the expert reports, are entirely relevant to its defense that there has been no occurrence under the Exxon Policies.

C. There are Material Differences Between the Exxon Pollution Exclusions and the Pollution Exclusions That Were the Subject of the 2004 Trial.

In arguing that the Exxon Policies have pollution exclusion provisions that are essentially the same as the provisions contained in the policies that were the subject of the 2004 trial, CDE (a) concedes that the exclusions are not identical, and (b) relies solely on the pollution exclusion contained in the 1978-1979 policies issued to Reliance (the "Reliance Policies"). (*See* CDE Mem., 12-14). This latter argument misses the mark. The Reliance Policies were not the only policies that were the subject of the 2004 trial before Judge Sabatino; rather, there were policies that spanned many years, from different provenances, and with varying coverage and exclusions. Thus, for example, some of the earlier policies did not even contain pollution exclusion

provisions. *See, e.g.*, Lloyd's 1959-1962 policies, Nos. CK4294, CK4295, K56745, annexed to the Toriello Cert. at Ex. D.

Turning to the Pollution Exclusion in the 1978-1979 Reliance Policies and those in the Exxon Policies, a comparison of these pollution exclusions reveals significant differences that disprove CDE's misguided contentions. CDE relies on the pollution exclusion in the Reliance Policies that were the subject of the 2004 trial, an industry form, approved by the Lloyd's Underwriters Non-Marine Association. It is a provision that limits coverage to:

> (1) Personal Injury or Bodily Injury or loss of, damage to or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this Clause shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damages or destroyed, *where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance.* (2) The cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden, unintended, and unexpected happening during the period of this Insurance. (3) Fines, penalties, punitive or exemplary damages.

(Sanoff Cert., Ex. M at Cornell 003719) (emphasis added). CDE concedes that the provision is a part of a Lloyds' printed form. (CDE Mem., 12-13). The provision was therefore not drafted by the parties, nor was it negotiated by the parties. That is decidedly different from the language of and history drafting of the lower level Exxon Policies.

For coverage less than $110 million, the Exxon Policies exclude, in pertinent part, coverage for:

> Claims resulting directly or indirectly from any seepage, pollution or contamination if such seepage, pollution or contamination
>
> (1) results directly from any known violation of any governmental statute, regulation, ordinance or law applicable thereto,
>
> (2) is intended or expected from the standpoint of the Insured or any other person or organization acting for or on behalf of the Insured.

(Ex. O to Sanoff Cert. at LDN 310, 584 Exxon 03819).

It is obvious that the inquiry under these two exclusions are entirely different. Thus the 1978 - 1979 Reliance exclusion focuses on the existence of a sudden, unintended and unexpected happening in 1978 - 1979. Absent such a happening the claim for pollution damages is excluded. As noted previously, for whatever reason, the 2004 trial did not try this issue. Nonetheless, even it if were tried, it would not have addressed the pollution exclusion in the lower levels of the Exxon Policies. That exclusion requires a determination of whether the seepage, pollution, or contamination (not the resulting harm) was expected or intended.

The lower level Exxon Policies pollution exclusion is not a "standard, industry-wide" pollution exclusion provision. Rather, the exclusion was drafted by Exxon/Ancon, whose terms and conditions were bargained for and negotiated. Indeed, Exxon/Ancon went so far as to seek out availability and a premium quote for its version of the pollution exclusion, differing as it did from the "standard" provision. (*See* Toriello Cert., Ex. E).

So too, the clause drafted by Exxon includes known violations of law as another basis for barring coverage. Importantly, because the clause was drafted by Exxon (the insured), *see* Toriello Cert. at Ex. E, any ambiguities must be construed against Exxon and, concomitantly against the construction now advanced by CDE, as an insured. *See Buckeye Cellulose Corp. v. Atlantic Mut. Ins. Co.*, 643 F. Supp. 1030, 1038 (S.D.N.Y. 1986) (finding that ambiguities must be construed against the insured because the policy language was provided by the insured's brokers) (citing 2 *Couch on Insurance 2d* § 15:78 at 389 (rev. 1984); *Metpath, Inc. v. Birmingham Fire Insurance Co. of Pennsylvania*, 86 A.D.2d 407, 412-13, 449 N.Y.S.2d 986, 989 (1st Dep't 1982); *see also Malick v. Seaview Lincoln Mercury*, 398 N.J. Super. 182, 187, 940

A.2d 1221, 1223 (App. Div. 2008) (stating generally, that ambiguous terms are construed against the drafter).

The argument that the 2004 trial and the *Morton* analysis used by the court bars Exxon from presenting evidence as to the applicability of the pollution exclusion in the Exxon Policies is legally flawed. The *Morton* Court's analysis was confined to the industry standard pollution exclusion provision. 134 N.J. at 28.[7] That analysis has no place in interpreting an individually drafted provision, and one drafted by the insured and not the insurer. *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-118, 1993 WL 542399, at *5 (Del. Super. Ct. Dec. 9, 1993) "ISO material, detailing the drafting history of a standard form contract, is not relevant to determining the meaning and context of specifically negotiated contractual provisions."). Second, as demonstrated by CDE's quotation from the LMI's trial brief, the 2004 trial proceeded on a misapprehension of the distinction between the analysis of the Occurrence definition and the analysis of the Pollution exclusion. The former looks at expectation of the harm and the latter looks only at expectation of pollution, contamination, or seepage regardless of the expectation of harm. *Morton*, 134 N.J. at 87. The limited nature of the proof presented at the 2004 trial is explained above in Point II.

In addition to the differences between the policies that were the subject of the 2004 trial and the Exxon Policies for coverage below $110 million, the Exxon Policies include upper level

[7] Moreover, *Morton*'s regulatory estoppel holding (*i.e.*, that certain insurers had misled state regulators in securing approval for inclusion of the standard pollution exclusion) does not apply to the Exxon Policies. Unlike the form policies at issue in *Morton*, the Exxon Policies were individually negotiated and, with respect to the SP&C Exclusion, used language supplied by Exxon and Ancon, the insureds, rather than language imposed in a form policy by the insurer. Thus, neither Exxon, Ancon, nor the insurers on the Exxon Policies were parties to the misleading activity or to the *Morton* proceedings. As if not enough, the insurers on the Exxon program were excess insurers, and therefore were exempted from New Jersey's insurance statutory provisions requiring submission and approval of "all rates and supplementary rate information." N.J.S.A. 17:29AA-5(a). To be sure, subsection (b) of N.J.S.A. 17:29AA-5 provides: "this section shall not apply to special risks...," which is defined as: "those commercial lines insurance risks...which are difficult to place or rate which are excess or umbrella or which are eligible for export." N.J.S.A. 17:29AA-3(k).

excess policies which provide coverage in excess of $110 million. (Sanoff Cert., Ex. P at Exxon 4510). These policies have the following pollution exclusion language[8], language which was not the subject of the 2004 trial for South Plainfield or on the summary judgment motion for Dismal Swamp:

> SEEPAGE POLLUTION AND CONTAMINATION ENDORSEMENT
>
> (A) As respects operations on or over or under water this policy does not insure against any liability for:
>
> (1) Personal Injury or Bodily Injury or Loss of, damage to, or loss of use of Property directly or indirectly caused by Seepage, Pollution or Contamination,
>
> (2) The cost of removing, nullifying or cleaning-up polluting or contaminating substances,
>
> * * * * *
>
> (B) as respects all other operations this policy does not insured against any liability for:
>
> (1) Removal of, loss of or damage to sub-surface oil, gas or any other substance, the property of others,...
>
> * * * * *
>
> (3) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of Property directly or indirectly caused by Seepage, Pollution or Contamination, provided always that this paragraph (3) shall not apply to liability for Personal Injury or Bodily Injury or loss of or Physical Damage to or destruction of Tangible Property, or loss of use of such Property damage or destroyed where such Seepage, Pollution or Contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

[8] There are other pollution exclusion provisions in some excess policies issued to Exxon in the relevant years by insurers which are not parties to this lawsuit. Because these insurers are not parties to this action, Exxon has not quoted these provisions in this Memorandum of Law, but it should be clear that there are these differences as well. *See* Toriello Cert. at 17.

> (4) The cost of removing, nullifying, or cleaning-up Seeping, Polluting or contaminating substances unless the Seepage, Pollution or Contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.
>
> * * * * *

(Sanoff Cert., Ex. P at 4510).

Significantly, the 2004 trial did not address operations on, over, or under water, for which all liability for clean up or damage caused by seepage, pollution or contamination is excluded pursuant to this upper level excess exclusion, subparagraph A (1). This obviously impacts the outflows from the South Plainfield plant into Bound Brook because these constitute "operations on or over or under water," as well as the dump and any impact on groundwater. So too, subsection B (1) of this provision absolutely precludes recovery for damage to "subsurface ... substances, the Property of others," which obviously includes ground water beneath the site, and the subsurface burial of reject capacitors. The expert evidence developed by Exxon, in the form of the Zoch and Gripp reports, directly supports the applicability of these exclusions, neither of which were the subject of the 2004 trial nor covered by any of the evidence adduced at that trial. As such, precluding Exxon from litigating these exclusions, which incontestably were not tried in the 2004 trial, is not supported by any issue preclusion doctrine and would directly contradict the denial of issue preclusion as a sanction by Judge Smithson.

With respect to exclusions B(3) and B(4), as explained in Point II above, the 2004 trial did not present evidence on nor argue the issue of whether CDE had proven that the exception to that exclusion should apply by showing that the seepage, pollution, or contamination "was caused by a sudden, unexpected, and unintended happening" during the policy period. The expert reports submitted by Exxon demonstrate that there was no sudden, unexpected, and unintended happening in

the period 1979 to 1983 that caused the subject pollution and there was nothing in the trial in 2004 that would demonstrate otherwise.

In a final effort to preclude Exxon from presenting evidence on its defenses, CDE cites to a prior coverage action that was filed in California involving Exxon, as an insured, and some of the London Market Insurers (hereinafter the "California Coverage Litigation"). (CDE Mem., 14). Of course, this argument has nothing to do with CDE's claimed prejudice resulting from either a discovery violation or the supposed re-litigation of issues that were supposedly litigated in 2004. By making this argument, CDE injects issues of policy interpretation that have not been previously resolved. Not only is CDE incorrect in its interpretation of the SP&C provision in the Exxon Policies, but its arguments regarding policy interpretation also contradict its argument that the pollution exclusions are identical

The argument that the pollution exclusion in the lower level Exxon Policies only applies if a known violation were also proven is inconsistent with the exclusion as written. This is because this argument requires the insertion of the word "and" between the two exclusionary items in the provision, a word that simply does not appear in this place. Rather, the provision is written as a list such that each of the exclusionary items, if proven, bars cover. The insurers in the California Coverage litigation correctly pointed out that the provenance of the clause was from Exxon or Ancon and, thus, any ambiguities would be construed against the insured, and not against the insurer. *E.g., Buckeye Cellulose,* 643 F. Supp. at 1038. Finally, the insurers in the California Coverage litigation correctly noted that the contemporaneous documents show that this argument for the insertion of a missing "and" was inconsistent with the parties' understanding of the relevant provisions. The insurers cited to a 1979 memorandum prepared by Ancon's Vice President John Cockshott, in which he explained:

> In view of recent publicity with regard to claims being made against chemical companies ... it seems appropriate to outline the scope of coverage of the TPL policy in respect of claims arising out of Seepage, Pollution & Contamination ... Fines, penalties and punitive damages are not insured; neither is SP&C which [sic] results from a knowing violation.... *Also excluded* is SP&C which is intended or expected.

(*See* Toriello Cert., Ex. F, at VI.10 (emphasis added)).

Further, CDE's contention that Exxon's Manager of Risk Management Arthur Lowry "admitted that the seepage, pollution exclusion in the Exxon Policies only applies where the insurer has shown a known violation of law" (CDE Mem., 14) is grossly misleading, premised as it is on a quote taken out of context. CDE's line of questioning related solely to the first item in the pollution exclusion. (*See* Toriello Cert., Ex. G, at 119-121). In fact, Mr. Lowry was testifying that if coverage is sought to be precluded under the first item, a known violation must be shown. Mr. Lowry did not, however, testify that a known violation *must* occur to exclude coverage for expected or intended pollution.[9]

CDE's argument also assumes, incorrectly, that a showing of intentional or expected pollution and a known violation will not be made at trial. In fact, the expert reports that CDE seeks to exclude demonstrate that CDE's generation, handling and disposal of industrial wastes during the time of its operations at South Plainfield knowingly violated statutes and regulations that were applicable to such operations. With respect to intentional conduct, Judge Sabatino already has found that the disposal of industrial wastes at the site was intentional (Toriello Cert.,

[9] The question put to Mr. Lowry related to the first item in the SP&C Exclusion. Thus, the questioning focused on "Claims resulting directly or indirectly from any seepage, pollution or connotation [sic] if such seepage, pollution or contamination (1)... results directly from any known violation." (Toriello Cert., Ex. G, at 119:10-15)). He was then asked with respect to a "claim resulting directly or indirectly from seepage, pollution or contamination results directly from any known violation. So in order for the exclusion to apply, there has to be a known violation involved?" Mr. Lowry's affirmative response responded to this limited question that related only to the known violation exclusion, and not to the SP&C as a whole. (*Id.* at 120:24-121:6).

Ex. H at 774) and the expert reports demonstrate that industrial wastes or factory refuse were well known pollutants in the 1930's, 40's, and 50's.

CDE has also not demonstrated any legal basis for a holding that Exxon is bound by an argument advanced in a different litigation where that argument was not adopted by the Court. Here, the California case was settled before any decision on the arguments submitted in that case. Absent such a decision, judicial estoppel does not apply. *Ali v. Rutgers*, 166 N.J. 280, 288 (2000) (internal citations omitted) ("[j]udicial estoppel is an extraordinary remedy, which should be invoked only when a party's inconsistent behavior will otherwise result in a miscarriage of justice"); *Kimball Intern v. Northfield Metal*, 334 N.J. Super. 596, 606-07, 760 A.2d 794, 799 (App. Div. 2000) (citations omitted) ("To be estopped a party must have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained.... Consequently, absent judicial acceptance of the inconsistent position, application of judicial estoppel is unwarranted because no risk of inconsistent results exists.").

Finally, it is undisputed that the California Coverage Litigation insurers (including the LMI) advanced the same argument as the one advanced by Exxon in this litigation with respect to the interpretation of this clause. As a result, there is no inconsistent position that is being asserted by the defendant insurers that would even suggest the consideration of judicial estoppel.

D. Exxon's Expert Reports Are Relevant to Its Defenses

In line with the Court's and the parties' focus on CDE's knowledge of environmental harm caused by PCB's and TCE from 1936 through 1962, the 2004 trial testimony of Dr. Wagner included in CDE's motion papers provided opinions on the industry pre-1962 knowledge of the harmful effects of TCE, CDE's knowledge of the hazardous nature of PCB's before 1962, and CDE's awareness or expectation of environmental harm from its disposal of PCB's and TCE before 1962. (Sanoff Cert., Ex. B at 489, 500, 513, 514). These opinions are

obviously directed at the showing of expected or intended harm, required under the Reliance Policy occurrence definition. The opinions are not directed at showing operations on, over, or under water, or damage to subsurface substances the property of others, or sudden, unintended, and unexpected happenings from 1979 to 1983, or expected or intended seepage, pollution and contamination. These latter issues are the issues that are addressed in Exxon's expert reports as well as other issues related to other defenses in this matter, such as known loss.

With respect to expected or intended seepage, pollution, or contamination, we fully expect that CDE accepts Judge Sabatino's findings that all of the types of discharges by CDE at South Plainfield were either intended (burial of reject capacitors and other industrial waste) or at least expected (incidental spills, seepage into drains and cracks, and airborne migration). (*Id.*, Ex. C at 749 -52). With respect to this issue as well as the other pollution exclusion issues and the other issues relevant to the defense of this matter, Robert Zoch's report, of course, discusses these pathways as well as the CDE industrial processes. These industrial processes were not the focus of Mr. Wagner's testimony. In addition, the defense was not allowed to use photographic evidence at the 2004 trial because it had not properly identified the evidence in its expert reports. (Toriello Cert., Ex. J at 635-45). Here, The report of Wayne Grip identifies and explains the use of stereoscopic photographs from before 1962 and Mr. Zoch's report explains how these photos are useful to describe the activity and evident pollution at the site by CDE. Among other things, on several dates, the aerial photos document improper dumping activity and a plume running from the outfalls of the CDE plant down the Bound Brook.

Mr. Zoch identifies the Bound Brook as a tributary of the Raritan River, thereby making it subject to the New Jersey Department of Health regulations issued on June 10, 1941. In those regulations, the Department of Health established "certain minimum requirements for the

treatment of domestic sewage, industrial wastes, or other polluting material discharged into the Raritan River and its tributaries...." Sixty-Fourth Annual Report of the Dep't of Health, State of New Jersey (1941) 111 - 113.[10] Among other things, these regulations prohibited the discharge of toxic substances, any substance with offensive odors, and required effluent, within certain limits, to be free of color or turbidity. Given the toxic nature of the discharges from the CDE plant and the changes in color as well as other characteristics of these discharges, these constituted known violations of the Department of Health regulations, expected or intended pollution, and pollution from operations on, over, or under water. Since the EPA has identified pollution of the Bound Brook as OU4, (*see* note 1 *supra*) this evidence is relevant to the defenses to this action and was not the subject of the 2004 trial.

Mr. Zoch also identifies evidence that CDE was pumping sewerage into the streets in South Plainfield, burning reject capacitors on more than one occasion thereby causing offensive odors and the dispersal of contaminants, and dumping capacitors in violation of Department of Health regulations. None of this was dealt with at the 2004 trial.

Robert Zoch's report, submitted on behalf of Exxon, while necessarily discussing PCBs and TCE, has a broader focus than Dr. Wagner's testimony. Unlike Dr. Wagner's narrow attempt to show CDE's specific knowledge of environmental harm caused by PCBs and TCE, Mr. Zoch's report discusses and opines on CDE's generation of "industrial waste" that includes PCBs and TCE and the recognition before and after the 1930's that industrial waste in solid or liquid form is a pollutant. Consequently, burying or discharging this waste constitutes expected

[10] The Sixty-Fourth Annual Report of the Dep't of Health, State of New Jersey (1941), as well as New Jersey statutes dating from 1876 through 1946 and the U.S. National Resources Committee, Third Report of the Special Advisory Committee on Water Pollution, Water Pollution in the United States, House Document No. 155, 76th Congress, 1st Session, (1939) are attached to the Toriello Cert at Exhibit K. Exxon has not included copies of all historical statutes and reports cited herein due to their volume.

or intended seepage, pollution, or contamination. Mr. Zoch identified numerous liquid wastes discharged by CDE, including storm water which conveyed any contaminants on the building roofs and surface soils, septic tank wastewater that resulted in the discharge of infected dissolved organic constituents, boiler blowdown/steam condensate, water distillation effluents, plating rinsewater containing soluble metals, soluble coolant wastewater, commonly known as "white water" and resulting in a visible plume, (as identified in the expert report of Youell). (Sanoff Cert., Ex. H, Sec. 2.5).

Mr. Zoch also identified and opined on the several types of solid wastes that CDE generated during its operations at the South Plainfield site. These included every day regular plant trash, which was picked up for disposal only periodically, fuller's earth, which was saturated with not only PCBs but also other absorbed impurities, industrial waste in the form of accumulated residue from solvent recycling and reject capacitors and components. (Sanoff Cert., Ex. H, Sec. 2.6).

Mr. Zoch concluded that CDE contaminated the South Plainfield site with "industrial waste", including liquid and airborne releases of metals, lead, cadmium, volatile organic compounds, and plating metals, in addition to PCBs and TCE. (Sanoff Cert., Ex. H, 14-16). Mr. Zoch also concluded that CDE discharged sewage waste and industrial process wastewater into Bound Brook, including sanitary sewage, soluble coolants, emulsified oils, as well as capacitors and other solid wastes. (*Id.* at 16-17). Mr. Zoch also concluded that CDE dumped plant production wastes in a dumpsite on the South Plainfield property, including reject capacitors. (*Id.* at 20-21).

Exxon intends to offer Mr. Grip's report to show the history of CDE's dumping and discharge of waste at the site and the effect that CDE's dumping and discharge had on the

environment. Mr. Grip's report is an expert analysis of aerial photography taken of the South Plainfield site. Mr. Grip's analysis shows that at least as of May, 1940, CDE was actively dumping waste at the South Plainfield site; such dumping affected Bound Brook. (Sanoff Cert., Ex. G at 3). In October 1947, CDE's dumping remained active, had expanded and was encroaching Bound Brook, and caused a plume. (*Id.* at 4). Four years later, the dumping remained active and the plume expanded in its reach. (*Id.* at 5). In 1957, CDE's disposal and discharge, which continued to cause changes to the soil surface area and to generate a plume, also showed an effect on the buildings. (*Id.* at 5-6 (roof of Building 16 changed in appearance and other buildings had light-toned stains)). By 1963, CDE maintained at least four disposal areas at the site. (*Id.* at 7). None of this evidence was admitted at the 2004 trial. (Toriello Cert., Ex. J at 635-45).

E. Exxon's Defensive Theory to Which the Expert Reports Relate is Based on a History of Regulations and Widespread Concern About Industrial Waste

In light of the overwhelming evidence of CDE's generation and discharge of industrial waste at the South Plainfield site, the report by Mr. Zoch identifies the long history of regulations and governmental and societal concern regarding the discharge of industrial waste. This history and CDE's conduct supports the known loss, occurrence, pollution exclusion and perhaps other defenses to CDE's claims. As a brief summary of this evidence, but not purporting to be exhaustive, New Jersey prohibited the willful pollution of creeks, ponds, and brooks in 1876. (State of New Jersey, General Public Laws, Chapter CLII, April 21, 1876).[11] In 1899, New Jersey explicitly recognized that factory refuse was a pollutant in "An Act to secure the purity of the public supplies of potable waters in [New Jersey]." Act of March 17, 1899, ch. 41, 1899 N.J.

[11] At Toriello Cert., Ex. I.

Laws.[12] The 1899 Act, prohibited "factory refuse", and "other pollutants", from being "placed in, or discharged into, the waters, or placed or deposited upon the ice, of any such river, brook, stream or any tributary or branch thereof . . . ." other New Jersey statutes regulating waste include: Act of April 18, 1930, ch. 186, 1930 N.J. Laws (prohibiting sewage or other polluting matter to flow in waters from any sewer, drain or sewerage system); Act of April 23, 1946, chs. 123 & 138, 1946 N.J. Laws (defining industrial waste as including wastes resulting from any processes of industry, manufacture, trade or business).[13] The federal government also recognized that waste threatened the waterways, enacting the Rivers and Harbors Appropriation Act of 1899 prohibiting deposits of refuse into navigable waters.

Beginning in at least the early 1900s, other states also enacted laws or regulations prohibiting the discharge of factory, industrial, and manmade waste. For example, New York in 1917 enacted Public Health Law § 76 (1917), which prohibited the "discharge of sewage and other matter into certain waters", broadly prohibiting the discharge in injurious quantities of any refuse or waste matter, either solid or liquid, from any sewer or drainage system, or "*from any shop, factory, mill or industrial establishment* . . ." (emphasis added). Connecticut soon followed in 1918, with the State Water Commission prohibiting corporations, among others, from placing, discharging, or permitting any manufacturing wastes prejudicial to public health to flow into, any of the waters of the state. Connecticut General Statutes, State Water Commission, Ch. 141 §§ 2546 2547. In the 1920s, Arizona and Nebraska joined suit, both states prohibiting pollution of waters, and Nebraska specifically prohibiting the dumping of factory refuse.

[12] At Toriello Cert., Ex. I.

[13] At Toriello Cert., Ex. I.

Revised Code of Arizona § 4694 (1928); Nebraska Complied Statutes, Game and Fish Commission § 37-516 (1929). Other states enacted similar statutes.

With respect to the Raritan River and its tributaries, such as Bound Brook, in 1930, the Port Raritan District Commission ordered the preparation of a report by independent engineers designed to address abatement of pollution of the Raritan River. METHODS FOR ABATEMENT OF THE POLLUTION OF THE RARITAN RIVER, Report to the Port Raritan District Commission (1930). In their 1930 report, the engineers found that the Raritan River was "threatened with destruction" as a result of pollution, and in particular, "the daily discharge into the stream of millions of gallons of raw sewage and industrial wastes." *Id.* at 5. The engineers noted that by the 1920s, the New Jersey Legislature was concerned about the level of pollution of the Raritan River and acted to investigate. *Id.* at 17.

In 1951, These findings were confirmed in a report issued to the Middlesex County Sewerage Authority.[14] The Foreword to the report stated, among other things, as follows:

> Today the Raritan River, its tributaries, . . . as well as Raritan Bay are dangerously polluted. The Surgeon General, United States Health Service Says, "These waters are among the most polluted in the Country."
>
> * * * *
>
> Contamination of the Raritan River and Bay waters comes mainly from . . . municipal sewage . . . and industrial wastes resulting from the processing of organic and inorganic materials.
>
> The polluted Raritan contains oil, grease, tar, acids, alkalis and other chemical substances in addition to domestic sewage. . . . People can't bathe or swim safely . . . . Even fish can't live in the polluted waters of the Raritan River.

[14] At Toriello Cert, Ex. I.

> One hundred and three million gallons of sewage and industrial wastes flow into the Raritan River daily . . . . In the twenty years since 1930, the flow of industrial wastes has increased fourfold. . . .

THE MIDDLESEX COUNTY SEWERAGE AUTHORITY, SUMMARY REPORT, ABATEMENT OF WATER POLLUTION IN THE RARITAN RIVER, ITS TRIBUTARIES, AND RARITAN BAY (March 15, 1951).

In a 1951 report issued by the Department of Sanitation, Rutgers University, and the Division of Environmental Sanitation of New Jersey State Department of Health, Dep't of Sanitation, et al., Report on Status of Pollution of the Raritan River and Bay and Effect of Discharging into the Bay Treated Mixed Effluents (January 1951), the authors note various surveys conducted from at least 1937 in which it was found that industrial waste was the cause of poor chemical conditions of the river. *Id.* at 8. By 1941, the expansion of industry created such an increase in industrial waste that the treatment plants - to the extent used - were unable to keep up with the volume. *Id.* at 9. The surveys proved that industrial waste played an "important role" in pollution of the river. *Id.* at 10. As noted earlier, in 1941, the Department of Health issued regulations that recognized industrial wastes as a form of pollution and prescribed *minimum* standards for discharge of industrial wastes into the Raritan River and its tributaries.

Industrial waste was also a matter of great federal concern, prompting President Franklin D. Roosevelt's creation of the National Resources Committee in 1935. Exec. Order No. 7065, June 7, 1935. In 1939, the National Resources Committee issued a report, U.S. National Resources Committee, Third Report of the Special Advisory Committee on Water Pollution, Water Pollution in the United States, House Document No. 155, 76th Congress, 1st Session, (1939),[15] the Committee specifically identified "industrial waste" as a major source of pollution and noted that a large variety and a great volume of wastes are discharged from industrial plants.

[15] At Toriello Cert., Ex. I.

Id. at 1. The Committee Report further stated that "[p]ollution results chiefly from urban sewage and a great variety of industrial wastes." *Id.* at 4. It went on to identify that industrial wastes resulting from the processing of organic and inorganic products were a major source of pollution. *Id.* at 4. The Committee details the costs, both economic and otherwise, of pollution, specifically identifying loss of wildlife, alteration of flora and fauna causing injury to fish and wildlife, bacterial pollution, the closure of shell fisheries in New York-New Jersey coastal waters, and loss of aesthetic and recreational value. *Id.* at 37-39.

Against the backdrop of these multi-state and federal regulations, government reports and investigations, local regulations and complaints, as well as newspaper and other groups' interest in pollution caused by industrial waste and factory refuse, the expert opinions of Mr. Zoch and Mr. Grip provide evidence of CDE's dumping and discharge of industrial waste, including PCBs and TCE, on, over, or under water and in a manner that might impact subsurface substances such as groundwater and soil. It is also evident from these reports and other evidence that CDE's acts with respect to South Plainfield and Dismal Swamp did not take place in the period 1979 through 1983. Finally, the evidence from these experts and other sources demonstrate that CDE expected or intended seepage, pollution, and contamination by its regular, continuous discharge and dumping of industrial wastes at South Plainfield before 1962.

POINT V

THERE HAS BEEN NO DETERMINATION AS TO THE LAW GOVERNING THE INTERPRETATION OF THE EXXON POLICIES

Although not raised by CDE in its Motion in Limine, there exists a significant issue as to whether New York, Texas, California, Ohio, or some other law should be applied, rather than New Jersey law, which was the law applied at the 2004 trial. That point has not been briefed in full or tried by either party. Importantly, "despite the difficulty, there must be a "'careful site-

specific determination, made upon a complete record.'" *Lonza, Inc. v. Hartford Accident & Indem. Co.*, 359 N.J. Super. 333, 347, 820, A.2d 53, 62 (App. Div. 2003) (quoting *Pfizer, Inc. v. Employers Ins. of Wausau*, 154 N.J. 187, 197-198 (1998)). Obviously, this Motion in Limine is not the proper vehicle to consider this issue. Nonetheless, as a preliminary matter, Exxon discusses some of the important points in a summary fashion so as to demonstrate that there is a choice of law issue that must be determined regarding the pollution exclusions in the Exxon Policies.

"The first step in [a] choice-of-law analysis is an inquiry into whether there is an actual conflict between the laws of this state and another. Any such conflict is to be determined on an issue-by-issue basis." *Lonza*, 359 N.J. Super. at 342, 820 A.2d, at 58 (internal citations and quotations omitted). For example, if New York law were to apply, there is undoubtedly a conflict between New York and New Jersey law on the interpretation of pollution exclusion provisions:

> As a matter of public policy, New Jersey will not enforce the standard pollution-exclusion clause unless "the insured intentionally discharged, dispersed, released or caused the escape of a known pollutant. *Morton*, *supra*, 135 N.J. at 31, 629 A.2d 831 (emphasis omitted). In contrast, New York had enacted a law, now repealed, that required insurance carriers to include that clause to deter companies from dumping toxic waste into the environment. *See Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 763 N.Y.S.2d 760, 795 N.E.2d 15, 18 (2003). Although New York no longer legally compels inclusion of the pollution-exclusion clause in comprehensive liability insurance contracts, *see ibid.*, we have no reason to believe that it would refuse to enforce such a provision on public policy grounds.

Sensient Colors Inc. v. Allstate Ins. Co., 193 N.J. 373, 395-396 (2008); *see also Pfizer*, 154 N.J. at 199-201 (summarizing the differences between New York's and New Jersey's interpretations of the "late notice" provision and the "pollution exclusion" exception). So too, New York law,

unlike New Jersey, interprets the phrase "sudden and accidental" as having a temporal component, requiring that a discharge of pollutants be both "sudden," *i.e.*, abrupt, and "accidental" in order to fall within the exception to the exclusion. *See., e.g., Northville Indus. Corp. v. Nat'l Union Fire. Ins. Co. of Pittsburgh, Pa.*, 89 N.Y.2d 621, 632-33, 657 N.Y.S.2d 564, 567-68 (1997). As noted above, the pollution exclusions in the Exxon Policies excess of $110 million also requires CDE to prove "sudden" happening during the policy period that causes the seepage, pollution, or contamination.

New Jersey has rejected a bright-line rule mandating the application of the law of the place where the contamination has occurred. *Pfizer,* 154 N.J. at 197; *Lonza, Inc. v. Everest Reinsurance Co.,* No. A-0170-03T1, 2005 WL 4005969, at *21 (N.J. Super. Ct. App. Div. May 16, 2006). Instead, it has opted for a case-by-case analysis of the factors informing choice of law decisions prescribed by the Restatement (Second) of Conflict of Laws § 6 (1969) in order to identify, consistently with the principles of § 193 of the Restatement (principal location of the insured risk), the state with the dominant interest in the matter. The methodology laid out by the *Pfizer* court requires consideration of the competing interest of the states involved, the national interests of commerce among the states, the interests of the parties and the interests underlying contract law, and the interest of judicial administration. *Pfizer*, 154 N.J. at 198.

Importantly, where a policy covers risks that implicate parties, operations and sites spread out over various states and across the world, principles of conflicts of law that place significance on the location of the insured risk, such as Section 193 of the Restatement (Second) of Conflict of Laws (1969), are diminished in significance and relevance. *See Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 134 N.J. 96, 112 (1993) ("when the subject matter of the insurance is an operation or activity and when that operation or activity is predictably multistate, the significance

of the principal location of the insured risk diminishes....") (internal citations omitted). Thus, the fact that the pollution may have occurred in New Jersey for two sites and California for one site implicated on the Exxon Policies for this case is of lesser importance and, certainly, is not issue determinative. Instead, the applicable law governing the interpretation of the SP&C exclusion is the state with the most dominant interest in the matter.

For example, Exxon maintained its headquarters in New York from 1882-1990. (*See* Toriello Cert., Ex. L at I.4). Thereafter, its headquarters have been maintained in Texas. The Exxon Policies were negotiated, brokered and issued through Exxon's New York based broker, Marsh & McLennan. (Toriello Cert., Ex. G). Likewise, the Policies themselves contain provisions which expressly call for notice, arbitration of disputes, investigation of claims, and other services to be conducted in and at places located in New York. (*See* Ettinger Cert., Ex. M at pp. Exxon-03809, 03812). Similarly, Reliance Electric Corporation, Exxon's subsidiary and, at the time, the parent of FPE and in turn, CDE, was located in Ohio.

Thus, the parties would not necessarily have expected New Jersey law to apply. As such, New York or Texas — as Exxon's then or current headquarters— or perhaps Ohio - as Reliance's headquarters - would be jurisdictions that could also conform to the parties' expectations. *Cf. Pharmacia & Upjohn Co. v. American Ins. Co.*, 316 N.J. Super. 161, 166, 719 A.2d 1265, 1267 (App. Div. 1998) (situs of waste generation and dumping does not determine which law governs; rather, the court must look to other determinative factors); *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17, 23, 822 N.Y.S.2d 30, 35 (1st Dep't 2006) (quoting *CPC Int'l Inc. v. Northbrook Excess & Surplus Ins. Co.*, 739 F. Supp. 710, 715 (D.R.I. 1990), *reconsideration granted on other grounds*, 839 F. Supp. 124 (D.R.I. 1993)).

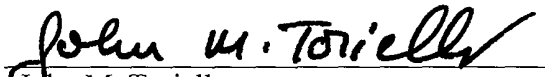
As the foregoing aptly demonstrates, there are many factors and interests—those of the states impacted, interests of commerce, judicial—that must be examined in order to determine which law will govern here. Determining this issue, as with the preclusion issue raised by CDE in its Supplemental Filing, is simply not appropriate in the context of this in limine motion.

Conclusion

The CDE Motion In Limine should be denied.

Dated: April 13, 2012

Respectfully Submitted,



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